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HARDROCK MINING ON THE PUBLIC LANDS

Ward A. Shanahan*

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I. INTRODUCTION¹

State and federal mining law is expanding to include activity on private lands, as well as development of minerals on lands patented under the Stockraising Acts, Homestead Acts and other federal or state reserved mineral lands. This expansion is occurring not only because of environmental sensitivity but also because of recent recognition of the national need for critical minerals. Mining is now concerned with Wilderness, Scenic Rivers, and Surface Owner Consent Acts as well as the traditional problems involving air and water pollution. This paper will not reach all of these subjects, but will be confined to mining law as it originally developed on the federal domain and the principal themes which appear in statutory law, including the Federal Land Policy and Management Act of 1976 and some important case law, including recent decisions.

* The author wishes to acknowledge the assistance of the Montana State Office of the Bureau of Land Management, and Dr. Sid Croff of the Montana Bureau of Mines and Geology, for helpful information used in preparation of this paper.

1. This paper is intended as an outline of the basic mining law as it applies to the federal domain. It was originally presented orally at the Public Land Law Conference held at the University of Montana in Missoula on April 25, 1980. It has been revised, to improve its readability and to include some changes which have taken place in the interim. Most noteworthy among the changes are the final regulations for surface management, issued by the Director of the Bureau of Land Management, November 26, 1980, effective January 1, 1981, 43 C.F.R. 3809.

II. THE LOCATABLE MINERAL: *WHAT ARE MINING CLAIMS AND MINERAL SUBSTANCES UNDER STATE AND FEDERAL LAW?*

A. *Historical Review*

The origin of "mineral entry" as an American legal concept can be found in Germanic rather than English Common Law. Free mining in this system included the right to use water, rights-of-way, and timber.² Usually, a ten percent royalty was due on the mineral, as well as a nominal rental for surface use. These customs were adopted by the miners in Derbyshire and Cornwall in England and transplanted to America following the California Gold Rush. There they became part of the political and economic background of the first American Mineral Statutory Mining Law, the Mining Law of 1866.³

Congressmen in the northeast had favored a leasing policy to help defray the cost of the Civil War. Westerners, influenced by their European tradition, favored the development of mining titles and free mining on the public domain. The Mining Act of 1866 legalized what up to then had been a general technical trespass. It recognized local rules, customs, and regulations prescribed by local law. Subsequently, the Act was held to include placers as well as lodes.⁴

The 1866 law, however, had an important defect, which was not fully corrected until 1872. It seemed to grant mining rights to lodes or veins themselves without reference to the surface. Although claims were limited to 200 feet in length, miners had the right to utilize whatever surface was necessary to follow the vein. Disputes arose as to the location of rights to deposits beyond the extent of the claim and had to be settled in the courts by promulgation of rules for "endlines" and "extralateral rights."⁵

Originally, Section 1 of the 1866 Mining statutes referred to "all valuable mineral deposits," which was interpreted to include placer claims.⁶ Moreover, Section 2 controlled situations where there were veins or lodes of quartz or other rock in place bearing gold, silver, cinabar, copper, or other valuable deposits. The scope of the Act was

2. 1 AM. LAW OF MINING § 1.1; Morrison's Mining Rights Seventh Ed.—(1892).

3. 1 LINDLEY ON MINES § 17 (1914); MACSWINNEY ON MINES (1897).

4. 1 AM. LAW OF MINING § 1.12; Morrison's Mining Rights (7th Ed.) pp. 9, 10; 15 Stat. 251 (1866).

5. Flagstaff Silver Mining Co. v. Tarbet, 98 U.S. 463 (1878); Iron Silver Mining Co. v. Elgin Mining & Smelting Co., 118 U.S. 196 (1886); Upton v. Larkin, 144 U.S. 19 (1892); East Central Eureka Mining Co. v. Central Eureka Mining Co., 204 U.S. 266 (1907). See also Morrison's Mining Rights (16th Ed.) pp. 219, 222; Montana Ore Co. v. Boston C. & S. M. Co., 27 Mont. 536, 71 P. 1005 (1903); Whildin v. Maryland Gold Quartz Mining Co., 164 P. 908 (1917).

6. Steele v. Tanana Mines, 148 Fed. 678 (1906). See also Morrison's Mining Rights (16th) pp. 251, 252.

later expanded by court decision to include other varieties of metals as well as non-metallic minerals such as granite.⁷

The Placer Act of 1870⁸ amended the 1866 law to clarify provisions regarding the location of placer mining claims and expand them to include all forms of deposit, except veins of quartz or other rock in place. A placer is usually described as a superficial deposit (usually gold gravels) in the beds of ancient rivers or valleys. However, the 1870 Placer Act did not limit the claims to valuable deposits, and it allowed claims of up to 160 acres to be patented.

Both lode and placer claim laws were republished in 1872 under a single statute entitled the Mineral Location Law of 1872. This law prescribed a smaller size for claims and allowed the location of five-acre millsites and tunnel claims. It departed from the common law in one important respect. The apex rule, set out in Section 3, further defined priority of ownership of veins and lodes and pronounced an "endlines" principle which would be recognized in the *Flagstaff* case⁹ to settle a controversy under the 1866 law. Ownership within surface boundaries was no longer limited to the center of the earth. The vein could be followed along its full length, beyond the sidelines of the claim, to any depth. This law still governs most hardrock mining on federal lands.¹⁰

The locator had two problems, the extent of his claim and proof of

7. *Northern Pacific Ry. Co. v. Soderberg*, 188 U.S. 526 (1903). "This section (Act of May 10, 1872, 17 Stat. 91), like Section 2 of the Act of 1866 is susceptible of two interpretations, either that the words 'valuable mineral deposits' of the first section are limited to the particular metals described in the second section, or that those metals stood in particular need of regulation as to the length and breadth of vein, and power to pursue such veins downward vertically, and even beyond the vertical side line of the locations. This appears to us the more reasonable interpretation. The fact that no such limits were imposed on veins of coal or other minerals or metals indicates, not that the Act was intended to be confined to the minerals enumerated in Section 2, since that would be a clear restriction upon the words 'valuable mineral deposits' in the first section, but that these particular metals stood in special need of limitation and protection." *Soderberg* at 533. "Indeed, we are of opinion that this legislation consists with rather than opposes, the overwhelming weight of authority to the effect that mineral lands include not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture." *Soderberg* at 537-37.

8. July 9, 1870, 16 Stat. 217, 30 U.S.C. § 52 (1958).

9. *Flagstaff Silver Mining Co. v. Tarbet*, 98 U.S. 463 (1878). "As the law stands, we think that the right to follow the dip of the vein is bounded by the end lines of the claim, properly so called; which lines are those which are crosswise of the general course of the vein on the surface. The Spanish mining law confined the owner of a mine to perpendicular lines on every side, but gave him greater or less width according to the dip of the vein. But our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular." *Tarbet* at 467. For further discussion of claim boundaries, see *Silver Surprise, Inc. v. Sunshine Mining Company*, 15 Wash. App. 1, 547 P.2d 1240 (1976).

10. 17 Stat. 91 (1872), 30 U.S.C. §§ 22, 23 "The Apex Rule," §§ 26, 27 (1976).

the existence of a valuable mineral. Section 1 of the 1872 Act provided that all valuable mineral deposits on federal land could be free and open to exploration consistent with local rules and customs.¹¹ Early mining district rules and customs were replaced in Montana in 1895 with what is essentially the definition presently found in Section 82-2-101 of the Montana Code Annotated (1979).¹² The statute defines certain valuable deposits as veins, lodes, or ledges of rock in place bearing gold, silver, cinnabar, lead, tin, copper or other deposits. The statute also allows patenting of placer deposits of gold and other deposits of minerals having commercial value.¹³

The definition of a valuable mineral was modified by the Mineral Leasing Act of February 25, 1920, which withdrew deposits of "coal, phosphate, sodium, potassium, oil, oil shale, native asphalt, solid or semi-solid bitumen, and bituminous rock [including oil-impregnated rock or sands from which oil is recoverable only by special treatment after the deposit is mined or quarried] or gas, and lands containing such deposits owned by the United States including those in national forests . . . ,"¹⁴ from location and provided for their disposition only by lease. Helium was exclusively reserved to the United States.

In the Common Varieties Act of July 23, 1955,¹⁵ Congress provided that no deposit of common varieties of sand, stone, gravel, pumice, pumicite, cinders, or petrified wood should be deemed a valuable mineral deposit within the meaning of federal mining laws so as to give effective validity to any claim thereafter located. It provided, however, that nothing in the law should affect the validity of any mining location based upon discovery of some other mineral occurring in or associated with such a deposit. As used in the statute, common varieties do not include deposits of minerals which are valuable because of characteristics giving them distinct and special value. It does not include so-called "block pumice," which occurs in nature in pieces having one dimension of two inches or more. "Petrified wood" means agatized, opalized, petrified, or silicified wood, or any material formed by the replacement of wood by silica or other matter.¹⁶

B. *Court Decisions*

Some basic definitions of valuable mineral deposits have come out

11. 17 Stat. 91 (1872) § 1.

12. En. Sec. 3610 Pol. C. 1895; re-en Sec. 7365, Revised Codes of Montana (hereinafter referred to as R.C.M.) 1935; amd. § 1, ch. 4 Ex. L. 1971; R.C.M. 1947, § 50-701.

13. Montana Code Annotated (hereinafter referred to as M.C.A.) § 82-2-101 (1979).

14. 30 U.S.C. § 182 (1976).

15. 30 U.S.C. § 611 (1976).

16. The definition applies to 30 U.S.C. §§ 601, 603 and 611 through 615 (1976).

of the courts. The discovery rule, marketability rule, and prudent man rule first arose in the 1894 case of *Castle v. Womble*.¹⁷ There, the United States Supreme Court focused upon discovery of minerals of such character that a person of ordinary prudence would proceed in development with a reasonable prospect of success.¹⁸

Later, in *United States v. Coleman*,¹⁹ the prudent man rule was further refined to include a marketability test, or a determination of whether the mineral could be moved and extracted at a profit. In denying the application for a patent, the Court concluded that profitability was an important consideration in applying the prudent man test.²⁰

After 75 years, the Supreme Court had joined the prudent man test and the marketability test and said they were essentially the same. The latter was made a logical extension of the first. This laid the ground work for some of the rules issued by the Bureau of Land Management for location and patent²¹ and for surface disturbance.²² The decisional analysis also serves as the basis for regulations issued by the Forest Service for mining in national forests.²³ Not only must the mineral locator be certain he has a valuable, locatable mineral and comply with the surface regulations in the development of his claim, but he must also ascertain whether the federal domain upon which he has made his discovery is open to location. This presents some special problems.

III. LANDS OPEN TO LOCATION

The mining law of 1872 states that all lands belonging to the United States, both surveyed and unsurveyed, are open to location. This was limited to all "vacant, unappropriated, and unoccupied tracts" in the public domain by the United States Supreme Court in 1922 in *Oklahoma v. Texas*.²⁴ The Court said that the location laws do not apply to all lands of the United States but only those held for disposal under public land laws. This restriction excludes location on National Parks, military reservations, and acquired lands. Moreover, location laws never apply where the United States directs disposal under other laws.²⁵ The question as to what are public lands or public

17. 19 L.D. 455 (1894); see also *Chrisman v. Miller*, 197 U.S. 313 (1905); *Lange v. Robinson*, 148 Fed. 799 (1906); *Jefferson-Montana Copper Mines Co.*, 41 L.D. 320 (1912); *Cameron v. United States*, 252 U.S. 450 (1920).

18. *Castle v. Womble*, 19 L.D. 455, 457 (1894).

19. 390 U.S. 599 (1968).

20. *Id.* at 602.

21. 43 C.F.R. § 3810 (1979).

22. 43 C.F.R. § 3809 (1980).

23. 36 C.F.R. § 252 (1980).

24. 258 U.S. 574 (1922).

25. An example is indicated by the special acts passed regarding Indian lands. In 1890

domain is therefore actually best answered by a statement of what is not public domain. Clearly what is not public domain is land which has been reserved or withdrawn for other purposes.

Although some congressional actions appear to encourage mining on the public domain, such as the Multiple Mineral Development Act of 1954,²⁶ the Minerals Exploration Act of 1958,²⁷ and the Mining and Mineral Policy Act of 1970,²⁸ an opposite interpretation is also possible. In an article entitled "*Is Our Account Overdrawn?*" Gary Bennethum and L. Courtland Lee made a strong case for the skeptics.²⁹ Their discussion criticized the substantial withdrawal of the public land from the operation of the minerals laws. The authors state that nearly 400 million acres have been withdrawn from the operation of the mining law and over 500 million acres from the leasing laws in addition to more than 170 million acres being administered in such a way as to constitute a *de facto* withdrawal from mineral development. Thus, they conclude mineral exploration and development is specifically prevented or discouraged in an area the size of the states of California, Arizona, Washington, Oregon, Nevada, Utah, Idaho and one-half of Colorado. If current policy with respect to minerals under the mineral leasing laws is added, they conclude that exploration and development is prevented or discouraged in an area equal in size to all states east of the Mississippi, except Maine. Their principal point is that these withdrawals increase the likelihood of artificial manipulation of domestic supply and prices by foreign cartels.³⁰

Thus the open, unappropriated public domain is no longer the trackless expanse that is often imagined by the cramped city dweller, having been substantially reduced by reservations and withdrawals. The appropiable minerals have been limited by the 1920 Leasing Act³¹ and the Common Varieties Act in 1955.³² Court decisions have further

the bed of the Red River was made a part of the Territory of Oklahoma by federal statute, Act May 2, 1890, c. 182 §§ 1, 18, 20, 22, 26 Stat. 81. Two exceptional acts, one dealing with Wichita lands in 1895, Act March 2, 1895, c. 188, 28 Stat. 672, 876-899, and one dealing with the Kiowa, Comanche and Apache lands in 1890, Act June 6, 1900, c. 813, 31 Stat. 672, 676-681, provide a further indication. The Act of 1895 expressly extended the mining laws over a limited area to which it related and the Act of 1890 extended mining laws to part, but to all, of the lands to which it related.

26. 30 U.S.C. §§ 521-531 (1976).

27. 30 U.S.C. §§ 641-646 (1976).

28. 30 U.S.C. § 21a (1976).

29. American Mining Congress Journal (1975).

30. *Id.* Bennethum and Courtland buttress their argument by citing United States Geological Survey forecasts that within the next twenty-five years the United States will be 100% dependent on imports for 12 essential mineral commodities, more than 75% dependent for 15 commodities, and more than 50% dependent for 26 commodities.

31. 30 U.S.C. § 181 (1976).

32. 30 U.S.C. § 611 (1976).

defined "valuable mineral deposit"³³ and even the term "mineral" itself.³⁴ Also, various specific federal laws have made disposition of minerals more difficult.³⁵ The Secretary of Agriculture has been given authority to dispose of materials from the surface of unpatented claims (including stone) in addition to the authority already vested in the Secretary of the Interior.³⁶

One common misconception is that location may be made without restriction under provisions of the Stockraising and Homestead Act of 1916³⁷ which requires all patents issued thereunder to contain a reservation of minerals with the right to prospect and mine. Unfortunately, in many cases the government failed to make the reservation. On several occasions the Supreme Court has held that reservation will not be implied where the statute of limitations (12 years) has expired.³⁸ The wary miner should also know that the Taylor Grazing Act of 1934³⁹ requires the payment of surface damages. Additionally, the Coal Acts provide that you cannot *prospect* for coal on patented lands which have

33. *Shell Oil Co. v. Kleppe*, 426 F. Supp. 894 (1977). This decision involved oil shale placer mining claims in Utah that were located in 1917 under the Act of May 10, 1872, 30 U.S.C. §§ 22 *et seq.* The Mineral Lands Leasing Act, 30 U.S.C. §§ 181 *et seq.*, subsequently withdrew oil shale from location but preserved "valid claims existent on February 25, 1920, and thereafter maintained in compliance with the law under which initiated." Generally, mining laws require the discovery of a valuable mineral deposit prior to location of a valid claim, *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963), and, the presence of mineral must not be based on possibilities, belief and speculation alone but upon fact of value. *Castle v. Womble*, 19 L.D. 455, 457 (1894). In the case of oil shale, however, the government has stressed the fact that oil shale deposits would *inevitably* become commercially marketable. This inevitability removed the pre-1920 claims in existing oil shale deposits from the realm of mere speculation and gave them sufficient present value to constitute a valuable mineral deposit pursuant to 30 U.S.C. §§ 22 *et seq.* *Kleppe*, 426 F. Supp. at 904.

34. *Andrus v. Charleston Stone Products*, 436 U.S. 604 (1978). The issue presented upon appeal was whether water is a locatable mineral under the mining law of 1872. In *Andrus*, water use was a vital aspect of the sand and gravel operations of the petitioner in Nevada. In concluding that Congress did not intend use of the word mineral in its broadest sense, the Court recognized that if the term mineral in the statute were construed to encompass all substances that are conceivably mineral, there would be justification for making mine locations on virtually every part of the earth's surface. The fact that water may be valuable or marketable is not enough to support a mining claim's validity based on the presence of water. *Andrus* at 610-11.

35. 30 U.S.C. §§ 601-604 (1976) Surface Resource Act of 1947.

36. Amendment July 23, 1955, 30 U.S.C. § 612 (1976); *see also* The Multiple Mineral Development Act of 1954, 30 U.S.C. § 521 (1976) which allows claims and millsites on leased lands, except those leased for uranium and prohibits patenting without reservation of leasable minerals.

37. 43 U.S.C. § 291 (1976).

38. *United States v. Price*, 111 F.2d 206 (1940); *Washington Securities v. United States*, 234 U.S. 76 (1913); 43 U.S.C. § 1166 (1976) (12 year statute of limitations); *United States v. Winena* § St. Paul Rd., 165 U.S. 463 (1896); *St. Louis Smelting & Refining v. Kemp*, 104 U.S. 636 (1881); *Dredge v. Husite*, 369 P.2d 676, *cert. denied*, 371 U.S. 821 (1962) (direct attack on patent by government).

39. 30 U.S.C. § 315g (1976).

federal reservations without consent of the surface owner or without a guarantee to the owner against surface damage.⁴⁰

The Federal Land Policy and Management Act of 1976⁴¹ [hereinafter cited as FLPMA], although primarily a management framework contains a provision which purports to substantially change the 1872 mining law. Section 314 of the Act⁴² inserts new filing requirements for claims. Noncompliance with these requirements subjects the claim holder to a conclusive presumption of abandonment.⁴³

IV. LOCATION OF CLAIMS UNDER STATE AND FEDERAL LAW

Regulations promulgated under FLPMA⁴⁴ mark the end of mining for fun and recreation.⁴⁵ The chilling effect of Section 3833.4(a) is apparent from its terms. It clearly states that failure to follow the prescribed procedures will result in a conclusive presumption that the claim is abandoned and therefore void.⁴⁶ The procedure of recording a claim does not make it valid, it merely keeps it from expiring. The locator must still comply with all other laws. Additionally, filing under other federal laws does not excuse the filing required under Section 3833 except as to Oregon and California railroad lands⁴⁷ and National Park lands.⁴⁸ If any action or contest arises affecting an unpatented mining claim, mill, or tunnel site, a locator is not entitled to notice if there has been no record of the claim or site or a notice of transfer of interest. The United States will presume the locator does not exist. Failure of the United States to give notice that the lands claimed are not subject to location or that the location is otherwise void does not make any difference. A failure by the United States to challenge the locator on those grounds is not thereby a waiver and the issue can be raised at any later date.⁴⁹

In *Topaz Beryllium v. United States*,⁵⁰ a case on appeal challenging

40. 30 U.S.C. § 81 (1976), The Coal Acts of 1909.

41. 43 U.S.C. § 1701 *et seq.* (1976) [hereinafter cited as FLPMA].

42. 43 U.S.C. § 1744 (1976).

43. 1 American Law of Mining, Ch. III; 43 U.S.C. 1744 (1976); 43 C.F.R. § 3833 (1979).

44. 43 C.F.R. § 3833.4(a) (1976).

45. *Id.*

46. 43 C.F.R. § 3833.4(a) (1980). "The failure to file an instrument required by §§ 3833.1-2(a), (b), and 3833.2-1 of this title within the time periods prescribed therein, shall be deemed conclusively to constitute abandonment of the mining claim, mill or tunnel site and it shall be void."

47. 30 U.S.C. § 621 (1976).

48. 16 U.S.C. § 1907 (1976).

49. 43 C.F.R. § 3833.5 (1979).

50. 479 F. Supp. 309 (1979). The American Mining Congress and the Mining Associations of Colorado, Alaska, Utah, Idaho, New Mexico and the Northwest Mining Association of Washington.

this regulation, the plaintiff and intervenors alleged that promulgation of the regulations was beyond the authority of the Secretary and therefore void. They also alleged that the notice provisions violated due process. After reviewing the history of the mining laws, the court decided that both questions should be answered "No." The Court reviewed FLPMA and held that Congress gave the Secretary express authority to promulgate regulations to supplement existing law and regulations. The Court also held that these regulations were consistent with the specific legislative intent. The parties also attacked the conclusive presumption of abandonment. The Court concluded that the question was amenable to administrative ruling on the facts before the abandonment was complete and therefore the regulations were valid on their face. Moreover, the Court determined that part of the notice requirement applied only to a government-initiated proceeding. It did not apply to litigation involving third parties. Finally, the Court dismissed a challenge to the \$5.00 filing fee.⁵¹

A case is now pending in Montana which attacks Section 314 of FLPMA on grounds of substantial compliance, denial of due process and unlawful taking of property. The claimant had filed papers with the BLM which properly identified the claim, but was not in strict compliance with all of the filing requirements. The Bureau voided the claims and the decision was sustained by the Interior Board of Land Appeals.⁵² When decided, this case should directly confront the conclusive presumption of abandonment.

The General Mining Law of 1872 provides that mining claimants must declare their intentions to make claims under regulations prescribed by law and according to local custom. Thus state statutes and mining district rules have equal standing as procedures for making claims.⁵³ Mining district rules have now been almost entirely replaced by state statutes which was not preempted by federal law until the passage of Section 314 of FLPMA.

The cookbook formula for making a mining claim is contained in state law.⁵⁴ Once it has been determined that the place of location is in

51. 479 F. Supp. at 316.

52. *M.E. Rogers v. United States et. al.*, Docket CV-80-114-H U.S.D.C., Montana (1981).

53. 30 U.S.C. § 22 (1976); *Butte City Water Co. v. Baker*, 196 U.S. 119 (1905); *O'Donnell v. Glen*, 8 Mont. 248, 19 P. 302 (1888).

54. This paper will focus upon the mining statutes of the State of Montana, M.C.A. § 82-2-101 (1979), but it should be remembered that the statutes of all the public land states of the West have similar language. Montana's statute traces its origin to California law, Cal. Civ. C. § 1426 (1909), now codified and listed in Al. Pub. Res. Code § 2301 (West 1979). *See also*, Ariz. Rev. Stat. Ann. § 27-202 (1976); Colo. Rev. Stat. § 34-43-106 (1973); Idaho Code § 47-602 (1970); Or. Rev. Stat. § 517.010 (19); Utah Code Ann. § 40-1-2 (19); Wash. Rev. Code § 78.08.060 (19); Wyo. Stat. § 30-3 (19).

fact public domain and that location can be made without trespass, the locator must post his claim. The statute requires that he shall post the claim at the point of discovery in a conspicuous manner.⁵⁵ Within thirty days after posting the notice of location, the locator must distinctly mark the location in each corner or angle of the claim. The mark can be either an eight-inch tree blazed on four sides, a six-inch square by eighteen-inch stone, or a boulder at least three feet above the natural surface of the ground on the upper side. In addition to physically posting the claim, the locator is required to comply with the United States mining laws within sixty days.⁵⁶ Substantial compliance with these rules has recently been reaffirmed by the Montana Supreme Court in *The Anaconda Co. v. Whittaker*. The holding includes dicta indicating that the notice of discovery must be posted at or near some actual point of discovery rather than in the center of the claim.⁵⁷

The next step is recording the claim.⁵⁸ Within sixty days after posting the notice of location, the locator must record his location in the county where the property is located and within twenty days after filing, the county must forward a copy to the department of state lands. The record consists of a certificate of location for each claim containing the name of the lode or claim, the name of the locator, the date of location and the description of the claim.⁵⁹ It is extremely important that this verified certificate be filed because failure of the locator to properly record the certificate of location creates a *prima facie* presumption of intent to abandon.⁶⁰

The requirements of annual assessment should also be considered.⁶¹ Within ninety days after the expiration of the federal annual assessment work period, the owner of a claim must file an "Affidavit of Performance of Annual Work" with the county clerk and recorder. The affidavit must contain the name of the claim, legal description of the location, book and page number of the claim record, number of days' work done and the character of the work, dates when the work was performed, who authorized the work and the actual amount paid for work and improvements.⁶² The annual assessment work may be

55. M.C.A. § 82-2-101(1) (1979).

56. M.C.A. § 82-2-101(2), (3) (1979).

57. *Anaconda Co. v. Whittaker*, 610 P.2d 1177 (1980). The Montana court reversed a jury's finding of a valid claim. The court found that there was not sufficient evidence that Anaconda or its predecessor had actually discovered a vein, lode or ledge of rock bearing valuable minerals. Also there was not sufficient evidence to show that Anaconda had posted notice of location at the point of discovery. 610 P.2d at 1179.

58. M.C.A. § 82-2-102 (1979).

59. M.C.A. § 82-2-102(1) (1979).

60. M.C.A. § 82-2-102(2) (1979).

61. M.C.A. § 82-2-103 (1979).

62. M.C.A. § 82-2-103(1) (1979).

performed or caused to be performed at one or more points within a group of contiguous claims and may be utilized to satisfy annual assessment work requirements upon the group of contiguous claims.⁶³ Where group work is claimed for a group of claims crossing county lines, the statute requires filing in each of the counties in which such claims are located.⁶⁴ Additionally the affidavit must be verified before some officer authorized to administer oaths and, as with the other requirements, failure to properly comply is prima facie evidence of intent to abandon the claim.⁶⁵ Finally, compliance must then be made with Section 314 of FLPMA by filing the requirement documents with the state office of the Bureau of Land Management.⁶⁶

V. THE PROCESS FOR OBTAINING A MINERAL PATENT

The mineral patent application process is the subject of a fine publication by the Bureau of Land Management.⁶⁷

It should only be necessary at this point to recite an outline of its contents with a minimum of discussion and remind the reader of the marketability test from *United States v. Coleman, supra*.

A. Applications

Applications must include a correct, approved survey made subsequent to location in accordance with the 1947 manual for survey of public lands. Plat and field notes must accompany the patent application. In addition, the applicant must file a certificate of expenditures of at least \$500 per location, and a mineral surveyor's report including only those expenditures and improvements of the current applicant.⁶⁸

Next, the applicant must make a public notification of his claim. A plat of the survey must be posted on the claim and proof of posting must be filed with the manager. As a part of these notice requirements, two copies of the plat, field notes, notice and a statement of notice signed by two witnesses must be submitted.⁶⁹

At the time of posting, lodes and placers require duplicate applications for patent. The application must show that the claimant has a possessory right under state and federal law, including a brief statement of facts of compliance, origin of possession, the basis of the claim and a full description of the kind and character of the lode. There must

63. M.C.A. § 82-2-103(2) (1979).

64. M.C.A. § 82-2-103(3) (1979).

65. M.C.A. § 82-2-103(4) (1979).

66. 43 U.S.C. § 1744 (1976).

67. Bureau of Land Management, Dept of Int. Cir. No. 2289.

68. 43 C.F.R. §§ 3861.1-1; 3861.1-2; 3861.1-3; 3761.2-1; 3861.2-2; 3861.2-3 (1979).

69. 43 C.F.R. § 3861 (1979).

be a specific declaration for each lode claimed, any undeclared lode is excluded from the claim. If the declaration is for another mineral, the claimant must state why the deposit is regarded to be a valuable mineral.⁷⁰

Specifically, placer applications need to include an additional statement that the applicant is not trying to control a water course or to obtain timber. The applicant must make a good faith attempt to develop the mineral deposit and include the gold yield per pan or cubic yards. Also, while mill sites are patentable by both lode and placer claimants, substantiation of the non-mineral character of the land is required from two witnesses.⁷¹ Upon review the Bureau may require that the applicant amend the survey and bear the expenses of the new survey. The qualifications, employment and payment of mineral surveyors is specifically described by regulation.⁷²

B. Adjudication—Under Administrative Procedure

The application for a mineral patent will be scoured for accuracy and a reasonable time allowed to correct any deficiency. Full possessory title must be verified by the Solicitor for the Department. The proposed publication of notice will be approved and the applicant will be advised what newspaper is to be used for publication (the applicant is responsible for the cost of publication). Publication will be in the Wednesday issue of a daily or in each issue of a weekly for nine successive weeks (sixty days is computed excluding the first day of the issues). Proof of publication and posting must be made.⁷³

If no adverse claim is filed during the sixty-day period and no other objection appears, under the old law the applicant could purchase the lode at \$5.00 an acre or the placer at \$2.50 an acre. The price is now fair market value and entry will not be allowed until all required proofs are made.⁷⁴

C. Adverse Claims

Adverse claims⁷⁵ are to be filed in the same office where the patent application is filed by any person affected, his agent or attorney-in-fact with proof of agency or power of attorney. The adverse claim must fully set forth the conflict and state whether the claimant is a purchaser or a locator. If a locator is involved, a certified copy of the location or

70. 43 C.F.R. §§ 3862.1-1; 3863.1-3 (1979).

71. 43 C.F.R. §§ 3863.1-3(a); 3864.1-1 (1979).

72. 43 C.F.R. §§ 3861.2-5; 3861.3-1 (1979).

73. 43 C.F.R. §§ 3862.4-6; 3863.1(b) (1979).

74. 43 C.F.R. §§ 3862.4-6; 3863.1(b) (1979).

75. 43 C.F.R. § 3871.1 (1979).

an abstract must be filed (or if verbal, a narration of the circumstances). Additionally, a plat must be filed (if no legal subdivision is involved) and an official survey must be performed.⁷⁶

The BLM state manager will then give notice in writing that the adverse party has thirty days to commence a court action, otherwise the adverse claim is considered waived and the patent proceeding will be completed. There are different requirements for applications on Alaska land⁷⁷ and those filed prior to the effective date of the Act.⁷⁸ A court of competent jurisdiction under this procedure is either a state or federal court of general jurisdiction.⁷⁹ The successful party then must file a certified copy of the judgment as well as the mineral surveyor's certificate that the labor has been done, and pay the price before a patent can issue. If no suit is commenced by an adverse claimant the applicant must file a certificate to that effect by the clerk of the state having jurisdiction and the clerk of the United States district court for the district where the claim is situated.⁸⁰

D. Protests

Protests may also be filed on any ground tending to show that the applicant has failed to comply in an *essential* matter. A protestant must also pay a \$10.00 fee. A joint or co-interest holder can protest to preserve his interest because he is not deemed an adverse claimant, but a protest can not be filed by a losing adverse claimant in a court action.⁸¹ Jurisdiction is retained by the Bureau of Land Management, although

76. 43 C.F.R. § 3871.2 (1979).

77. 30 C.F.R. § 29.30 (1979).

78. 43 C.F.R. § 3871.3(h) (1979).

79. *Blackburn v. Portland Gold Mining Co.*, 175 U.S. 571 (1900); *Chambers v. Harrington*, 111 U.S. 350 (1884). "The first observation to be made is that Congress did not intend or prescribe jurisdiction in any particular court, state or federal. 'It shall be the duty of the adverse claimant, within thirty days after filing his claim, to *commence proceedings in a court of competent jurisdiction*, to determine the question of the right of possession, and to prosecute the same with reasonable diligence to final judgment.' The natural inference from this language is that the competency of the adjudicating court was not to be determined by the mere fact that the mining claims in controversy consisted of lands the title to which was in the United States." *Blackburn* at 578-79.

80. 43 C.F.R. § 3871.6 (1979).

81. *Turner v. Sawyer*, 150 U.S. 578 (1893). *Turner* involved a co-tenant situation. *Turner* had acquired an interest in a mine by payment of a wage claim for the annual work and sought to have Sawyer's interest transferred to him. Co-tenants who purchase outstanding titles or incumbrances, inure for benefits to all tenants and when acquired the co-tenant holds the interest in trust for fellow tenants. *Turner* at 586. The Court also cited *Garland v. Wynn*, 61 U.S. 6, 20 How. 6 (1857) and *Monroe Cattle Co. v. Becker*, 147 U.S. 47 (1892), for the proposition that where several parties set up conflicting claims, with which a special tribunal may deal, as between one party and the government, regardless of the rights of others, the later may come into ordinary courts of justice and litigate the conflicting claim. *Turner* at 587.

the agency proceedings will be stayed pending court proceedings where both the appellant and the adverse party are considered plaintiffs.⁸²

VI. EMERGING FEDERAL POLICY

The Mining and Mineral Policy Act of 1970⁸³ must be read in conjunction with the provisions of FLPMA⁸⁴ because its provisions are specifically referred to in the Congressional declaration of policy. The public lands are to be managed in a manner which recognizes the nation's need for domestic sources of minerals, food, timber, and fiber from the public lands. The policy expressly recognizes implementation of the Mining and Mineral Policy Act of 1970 as it pertains to the public lands.⁸⁵ Therefore, it can be concluded that at least as of 1976, it was in the national interest to encourage private enterprise in the development of sound and stable domestic mining, minerals, metal and mineral reclamation industries to help assure satisfaction of industrial, security and environmental needs. Such a policy includes stimulation of mining, mineral and metalurgical research to encourage both the recycling of the materials themselves and development of methods for disposal, control and reclamation of mineral waste products and reclamation of mineral land so as to lessen the adverse environmental impact of mineral extraction and processing.⁸⁶ In fact, Congress has delegated the promotion of this policy to the Secretary of the Interior who is also required to submit a statement regarding the current status of mineral development along with recommendations for new legislative programs in his annual report to Congress.⁸⁷ The development of this policy provides a good example of the conflict into which the Congress has placed the Department of the Interior. The original rule-making procedure contained objectives that permitted mining only under conditions that prevented unnecessary or undue degradation and provided protection of non-mineral resources on federal lands.⁸⁸

The new and final rules state that the objectives of regulation are to provide for mineral entry pursuant to the mining laws in a manner that will not unduly hinder such activities, provide for reclamation of

82. *Brown v. Gurney*, 201 U.S. 184 (1906); *see also*: Recent administrative decision, James E. Strong, Interior Board of Land Appeals 2-13-80 Determination of abandonment and voidness was set aside even though there was no date stamp or local record and all the BLM was given was a copy of what he was supposed to have filed. Since he had filed before the new rules (43 C.F.R. § 3833) he was held to have given notice under the old rules. Refer to: *McKay v. Wahlenmaier*, 266 F.2d 35 (1955) for authority relied on by IBLA.

83. 30 U.S.C. § 21a (1976).

84. 43 U.S.C. § 1701 (1976).

85. 43 U.S.C. § 1701(a)(12) (1976).

86. 43 U.S.C. § 1701(a)(8), (12) (1976).

87. 43 U.S.C. § 1701(a)(5) (1976).

88. 43 C.F.R. § 3809 (1980).

disturbed areas and coordinate, to the greatest extent possible, with appropriate state agencies, procedures for prevention of unnecessary or undue degradation with respect to mineral operations. These objectives now place their emphasis on mineral operations. They emphasize that mining will go forward on the federal domain and will not be prevented by other considerations. The objective is to provide *adequate* protection from degradation with the least possible burden to the mining industry.⁸⁹

The introduction to the new regulations contains eight detailed pages of discussion of public comments on the draft. This is an interesting post-mortem on the conflict which occurred during the hearing process. The result is a compromise regulation which establishes three levels of mining activity. The first "casual use" is not regulated at all. It is designed for the weekend miner or prospector who creates only negligible disturbance. The second, which covers disturbance of five acres or less, requires only notice to the BLM fifteen days before the activity starts. No approval or bonding is required. Operators of claims larger than five acres are required to submit a detailed mining plan, bonding may be required, and the BLM must act on the application within thirty days or waive its objections.⁹⁰

This regulation represents a recognition of the national policy to encourage mining on the federal domain, with respect to all lands open to location. It expressly excludes lands in wilderness or under consideration for wilderness designation. The Wilderness Act allows application of the mining laws until midnight, December 31, 1983.⁹¹

VII. ENVIRONMENTAL CONSIDERATIONS

In order to place the Department of Interior's burden of developing mining on the federal domain with adequate environmental protection in perspective, certain recent cases should be reviewed. In *South Dakota v. Andrus*,⁹² a case which involved a mineral patent application for twelve mining claims (twenty acres each) in the Black Hills National Forest, the applicant claimed a discovery of 160 million tons of low grade iron ore. The mining plan was to remove seven million tons a year and process them into pellets. The BLM contested the patent application at the request of the Forest Service on the grounds that there was no discovery of a valuable deposit. The state then intervened and raised the question of environmental compliance before the Interior Board of Land Appeals. The state said that a project which would

89. 43 C.F.R. § 3809.0-2 (1980).

90. 43 C.F.R. §§ 3809.1-2, 3809.1-3, 3809.1-4 (1980).

91. 16 U.S.C. § 1133(d)(3) (1976).

92. 614 F.2d 1190 (8th Cir. 1980).

take 240 to 1,140 acres of land from a national forest and discard 2.3 million tons of waste a year required an environmental impact statement. The Board held that no environmental impact statement was required but remanded the case for hearing on other grounds.

The state sued in federal court to compel preparation of an environmental impact statement under the National Environmental Protection Act⁹³ before the mineral patent could issue. In affirming the district court, the circuit court agreed that the issuance of the patent is a ministerial act and not covered by the National Environmental Protection Act. The court reasoned that the issuance of the patent does not allow the private party to do anything, so the granting of the patent was not a major federal action. The question of whether an environmental impact statement was required in the discharge of the Secretary's duties under the mining laws was not reached and therefore not discussed.

It appears that the question of major action might be raised in any case where a plan would be filed under the Surface Management regulation.⁹⁴ What is "major" will then be a question of fact for the Department, the applicant and the courts. In *Andrus*, the Eighth Circuit expressed doubt as to this question and referred in a footnote to *Natural Resources Defense Counsel v. Berklund*.⁹⁵ Therein, the D.C. Circuit had held that the words "the fullest extent possible" in Section 102(1) of the National Environmental Policy Act limits the act by any existing statutory scheme which conflicts with it. The Secretary was held to have no discretion but to grant a coal lease in that case. Although the court recognized that environmental analysis would be required where possible as required by the Act, action on the lease could not be denied or prevented.

The words of the D.C. Circuit are significant because of the marketability test of *Coleman*.⁹⁶ The agency requires a demonstration that the estimated revenues of a project can reasonably be expected to exceed estimated costs. Moreover, for some lease applications outstanding under the former version of the provision, the property rights anticipated by the permittee applicants can not be diminished. Where environmental damage from granting leases to entitled parties is certain, the Secretary is authorized to negotiate an exchange for other mineral leases of similar value.⁹⁷ Since it appears that a coal lessee is entitled to an exchange when environmental problems block his mining

93. 42 U.S.C. § 4332(c) (1976).

94. 614 F.2d at 1195.

95. 609 F.2d 553 (1979).

96. 390 U.S. 599 (1968).

97. 43 C.F.R. § 3520.1(c) (1979).

plan, it would seem that a title holding patentee must be in a better position.

VIII. CONCLUSION

This overview is intended to give some insight into hardrock mining on the public domain and should provide the practitioner with a handy set of references to basic mining law. In my view both mineral development and environmental protection are in the national interest. The public land law now developing must insure that these concerns are properly balanced.

